Amoco Production Company *and* Local Union No. 4–14, Oil, Chemical and Atomic Workers International Union, AFL–CIO. Case 23–CA–5285

July 23, 1982

THIRD SUPPLEMENTAL DECISION AND ORDER

On September 29, 1975, the National Labor Relations Board issued its Decision and Order[1] in the above-entitled proceeding finding that the Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by refusing to bargain and by repudiating its collective-bargaining agreement with the Union after it affiliated with Oil, Chemical and Atomic Workers Union, AFL–CIO (OCAW), and changed its name from "National Oil Workers Union Local 14" to "Local 4–14, OCAW." In a Supplemental Decision and Order[2] issued on November 1, 1977, the Respondent was ordered to reimburse the Union for the dues it failed to withhold and remit as required by the collective-bargaining agreement. On June 22, 1978, the United States Court of Appeals for the Fifth Circuit granted the Board's motion to withdraw the record on review, and the parties were notified on July 3, 1978, that the Board had decided *sua sponte* to reconsider its decision and that statements of position could be submitted. The Board received timely statements of position from the Charging Party and the Respondent. Thereafter, on January 3, 1979, the Board issued a Second Supplemental Decision and Order[3] in which it reaffirmed its Supplemental Decision and Order and found, *inter alia*, that the issue of union affiliation was an internal matter with which the Board will generally not involve itself.

On March 7, 1980, the United States Court of Appeals for the Fifth Circuit denied enforcement of the Board's Order and remanded the case to the Board to make a factual determination as to whether Local 4–14, OCAW, was a successor to NOWU, Local 14.[4] Thereafter, the Board received statements of position from the parties.

The Board has reconsidered its decision in light of the entire record and the statements of position and, for the reasons set forth herein, has decided to dismiss the complaint in its entirety.

The basic facts are not in dispute and have been fully set forth in *Amoco I, supra*. Briefly stated they are as follows: NOWU was certified by the Board in 1963.[5] The parties entered into their initial collective-bargaining agreement in 1965. During two elections were conducted by NOWU ing affiliation with OCAW. Both proposals defeated and NOWU remained an independe affiliated union.

In 1974 NOWU's board of directors unanim agreed that another affiliation election be co ed as soon as possible. Nine meetings were h discuss the question of affiliating with OCAW tices were posted on various bulletin boards s the reason for the meetings and the fact that were open to both members and nonmembe representative of OCAW was present to an questions. Those who attended the meeting informed that in order to vote they must be members of the Union and that this could b complished by signing a dues-authorization c This was in accordance with NOWU's by Thereafter, ballots were mailed to 382 mem who were on a current checkoff list maintained the Respondent. There were 480 employees in unit. Included with the ballot was a postage envelope addressed to a post office box rented pecially for the election. The results were 2 favor of affiliation and 71 against.

In July 1974, NOWU notified the Respondent its affiliation and that it intended to continue its lationship with the Respondent but that it wo now be known as Local 4–14, OCAW. The spondent replied by sending a letter to e member of the bargaining unit stating, *inter a* that the collective-bargaining agreement betwe the Respondent and NOWU was void. Upon charge filed by OCAW the General Counsel issu a complaint alleging that the Respondent violate Section 8(a)(5) of the Act.

A hearing was held before an Administrati Law Judge who found that the Respondent violated Section 8(a)(5) of the Act. This dec was adopted by the Board, Member Jenkins senting. (See *Amoco I, supra.*) The rationale for decision was articulated in *Amoco III*, su Member Jenkins dissenting. The Board held that affiliation vote was nothing more than an inter union matter with which the Board does not ordi narily intrude and, notwithstanding the fact that only members were allowed to vote, that the affi ation was valid.

The Fifth Circuit Court of Appeals remand the case to the Board to make a factual determi tion regarding whether OCAW was a successor NOWU.[6] In so doing, the court did not pass on

[1] 220 NLRB 861 (herein *Amoco I*) (Member Jenkins dissenting)
[2] 233 NLRB 158 (herein *Amoco II*).
[3] 239 NLRB 1195 (herein *Amoco III*) (Member Jenkins dissenting).
[4] 613 F.2d 107.
[5] The name of the Union when certified was Independent Oil Workers Union, Local 14. However, after the certification the Union changed its name to NOWU, Local 14. This change was reflected in the collective-bargaining agreement.
[6] 613 F.2d at 112.

validity of the affiliation election. However, the issues of the validity of a "members only" affiliation vote is a threshold question here for, if the affiliation election were improper, the question of successorship would be moot. For the reasons that follow, we now find that the affiliation vote held in this case was invalid because nonmembers were not permitted to vote, in violation of fundamental due process standards.[7]

Initially, we note that the Board has consistently held that, while affiliation elections need not meet the standards the Board has enunciated for its own election proceedings, there are certain due process requirements which must be met in order to have a valid affiliation election.[8] The issue before us is whether or not the fact that nonmembers are ineligible to vote satisfies adequate due process standards. We find that it does not.

As Members Jenkins and Zagoria stated in their dissent in *North Electric Company*,[9] a position which later became the basis for the Board's decision in *Jasper Seating Company, Inc.*:[10]

> If the Board is to accept privately conducted elections as a basis for amending Board certifications, it should be certain that minimal standards of due process be observed lest the very validity of Board certifications and elections be undermined. Granted that employees in a bargaining unit cannot be compelled to vote, they can, at the very least, be afforded *the opportunity to vote*. It appears basic to the collective-bargaining process that the selection of a bargaining representative be made by the employees in the bargaining unit. In our view, therefore, a cardinal prerequisite to any change in designation of the bargaining representative is *that all employees* in the bargaining unit be afforded the opportunity to participate in such selection.

To contend, as do our dissenting colleagues, that a union affiliation vote is an internal union matter into which the Board does not ordinarily intrude is inconsistent with their own position. If, in fact, union affiliations are internal union matters why does the Board even look to see if adequate due process has been achieved? The obvious answer to that question is that once either party raises the question of affiliation, either by an amendment to certification proceeding or, as here, as a defense to an 8(a)(5) charge, it is incumbent upon the Board, before it places its imprimatur on an affiliation election, to assure that that election meets adequate due process standards.

Additionally, it is inconsistent to permit all unit employees to vote in a representation election but, when the question is one of affiliation with another union, to permit only union members the right to vote. The question of affiliation is distinguishable from those situations cited by the dissent. Unlike strike votes, contract ratification votes, etc., which the dissent would equate with affiliation votes, only the latter directly impacts upon matters within the breadth of the Act and results in an undermining of the Board's own election and certification procedures. As even the Board majority in *Amoco III* concluded, affiliation votes affect the interests of all employees. To argue that all unit members were afforded an opportunity to join the Union and thus participate in the election is to shut one's eyes to Section 7 of the Act. Section 7 clearly gives employees the choice of participating in union activities or to refrain from engaging in those activities. The dissent gives mere lip service to Section 7 and relegates the phrase "adequate due process" to mere verbiage.[11]

Accordingly, we find that, in order to provide adequate due process safeguards in an affiliation election, all unit employees, whether union members or not, must be permitted to participate and vote in an affiliation election. Because, in this case, all unit members have not been accorded those rights we find that the affiliation was improper and therefore the Respondent did not violate Section 8(a)(5) of the Act when it refused to bargain and repudiated the collective-bargaining agreement.[12]

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[7] Although this case was remanded on the "successor" issue, we do not believe we are foreclosed from considering the validity of the affiliation vote. The facts and positions of the parties on the issue are fully before us. See fns. 1, 2, and 3, above. Therefore, in reaching our decision in this case, we find it unnecessary to pass on the "successorship" issue.

[8] *Bear Archery, Division of Victor Comptometer Corporation*, 223 NLRB 1169 (1976).

[9] 165 NLRB 942, 944 (1967).

[10] 231 NLRB 1025, 1026 (1977) (then Chairman Fanning dissenting).

[11] Additionally, we note that our dissenting colleagues stress that their concept of due process includes the requirement that nonmembers be permitted to join the union prior to any affiliation vote, and thus participate in that vote. However, shortly after the Board's decision in *Amoco III* was issued, a Board majority which included one of our dissenting colleagues placed its imprimatur on a privately conducted affiliation vote in which nonmembers *were* foreclosed from participation by the union's imposition of an election eligibility date which had already passed. *Providence Medical Center*, 243 NLRB 714 (1979) (Member Jenkins and then Member Penello dissenting in relevant part). As pointed out in Member Jenkins' dissent in *Providence*, in the past varying Board majorities utilized various rationales and erected different standards in deciding each affiliation case before them. Indeed, the only consistency in past cases has been the ultimate result upholding the "members only" elections. The dissent would continue this course by upholding the affiliation vote in the instant case. This we are unwilling to join.

[12] The dissent makes much of the fact that even if the disenfranchised employees were permitted to vote they could not have affected the outcome. Our Decision today is to insure adequate due process in all affiliation votes. As Member Jenkins stated in response to this same argument in *Amoco I, supra*, "the effects of the exclusion cannot be measured by a mere numerical tally."

The dissent accuses us of depriving employees of their freely chosen representative and denying them the fruits of collective bargaining. With

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ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBERS FANNING and ZIMMERMAN, dissenting:

For the reasons set forth in the majority opinion in *Amoco III*,[13] we would find that the affiliation election conducted here met adequate due process requirements, and accordingly would find that the Respondent violated the Act by refusing to bargain with the lawful representative of its employees.

The majority position is nothing more than an adoption of the dissent in *North Electric Company*.[14] The Board wisely rejected that view in that case and again 4 years later, in *The Hamilton Tool Company*,[15] where the Board stated:

> As the subject voted upon involved an internal union matter relating to the affiliation of the incumbent union rather than to the employee selection of a bargaining representative, the preclusion of nonmembers from voting did not affect the regularity of the election. As the Board has observed under similar circumstances, when "adequate opportunity to vote is provided to all those . . . eligible to vote, the decision of the majority actually voting is binding on all."[16]

This principle, that the Board generally will not intrude into internal union affairs, has been supported numerous times by the Supreme Court.[17] Indeed, in *Scofield* the Court made it clear that the Board has no authority to involve itself in internal union rules unless "the rule invades or frustrates an overriding policy of the labor laws."[18] Notwithstanding this clear statement of the law, the majority, under the guise of "due process," finds that an internal union rule which sets forth a basic criterion for voting, i.e., membership, voids an otherwise valid affiliation election.

The contention that all unit employees must be permitted to vote in an affiliation election because of its incidental impact on all unit employees is *non sequitur*. As the Board stated in *Amoco III*:

> That the option to participate in an affiliation election is not accorded to nonmembers differs little from their exclusion from other internal matters, including strike votes and contract ratification votes, and the selection of officers, stewards, and negotiators.[19]

Certainly those recognized internal union matters, especially contract ratification—the very terms of the collective-bargaining agreement under which both member and nonmember employees must work—have as much, if not more, impact on nonmembers as an affiliation.

Nor does the rule infringe on any Section 7 right. If an employee wishes to participate in union affairs, he is free to join and to vote.[20] If he has not joined, and was not unfairly barred from doing so, he is responsible for his own disenfranchisement. Having engaged in conduct which plainly proclaims his lack of interest in the union's internal affairs, it is neither surprising nor unfair that the union has taken his actions at face value. And it is no more surprising, and no more unfair, when the union does not solicit his views concerning its internal affairs.

Any tension between the right of members of the unit to a voice in their representation and the right of members of a union to decide for themselves the future of their union must be resolved in favor of the union membership. It is the union member who is most affected by union affiliation. In contrast, the effect of affiliation on the unit member who has elected not to join the labor organization which represents him is indirect. Nor is that unit member foreclosed from participation in a valid affiliation process should he feel vitally concerned; for, if he has not been given fair opportunity to join the union and to participate in its affairs, due process has not been satisfied. Lacking due process, we would not recognize the affiliation.

The majority does nothing more—and nothing less—than deprive employees of their freely chosen

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all due respect, however, we believe that it is the dissent which would deprive *employees* of the benefits guaranteed by the Act. By permitting the exclusion of nonmembers from affiliation elections, the dissent would ignore the wishes of all employees and permit only union members to impose their wishes on all employees, even where only a minority of the employee complement are union members. As we stated in *Quemetco, Inc.*, 226 NLRB 1398, 1399 (1976), it is the *employees'* freedom to select a bargaining representative which is of paramount importance under the Act.

[13] 239 NLRB 1195 (1979).

[14] 165 NLRB 942 (1967).

[15] 190 NLRB 571 (1971).

[16] *Id.* at 574.

[17] See *N.L.R.B.* v. *Boeing Co.*, 412 U.S. 67 (1973); *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969); *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967).

[18] *Id.* at 429.

[19] 239 NLRB 1195 at fn. 1.

[20] The majority misstates our position regarding due process. We do not hold, nor did the *Amoco III* majority, *supra*, that due process requires that nonmembers be allowed to join in time to vote in a particular affiliation election. It only requires that they be permitted to "become members and participate under normal union rules." *Id.* Had the affiliation election date or membership rules in *Providence Medical Center*, 243 NLRB 714 (1979), been manipulated to foreclose participation by nonmembers, Member Fanning would not have accepted the result. Here, of course, nonmembers had full opportunity to join the Union before the affiliation vote. Thus, Member Fanning's position in *Amoco III* and *Providence* is entirely consistent.

representative and denies to them the fruits of collective bargaining which the Act was designed to guarantee.[21] We dissent.

[21] Here, even if all unit members had been permitted to vote, and had done so against affiliation, the outcome of the election would have been unchanged.